THE LIQUIDATOR OF AFRASIA BANK ZIMBABWE LIMITED
versus
ZIMBABWE SCHOOL EXAMINATIONS COUNCIL
and
CHIEF REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 5 April 2018 & 26 September 2018

Opposed motion- Insolvency Act-Impeachable Transactions

A Mugandiwa, for the applicant
S Moyo, for the 1st respondent

MUSHORE J: This matter was placed before me on my opposed roll of matters. The facts are these. In 2014, the first respondent which is the Zimbabwe Board Examinations Council made a series of investments by way of fixed-deposits with the applicant bank. They were as follows:-

a) US$5000,000-00, on the 19th May 2014 maturing on the 18th June 2014 with a maturity value of US$505,416-67;
b) US$500,000-00 on the 22nd May 2014 maturing on the 23rd June 2014 with a maturity value of US$505,777-78; and
c) US$500,000-00 on the 27th May 2014 maturing on the 26th June 2014 with a maturity value of US$505,416-67.

Thereafter, according to the applicant, all three investments were rolled over to mature on 29 August 2014 with a maturity value of US$1,666,388-89. The investment maturity value is not in contention. On the maturity date, however, applicant bank failed to pay the first respondent its return on the investment citing liquidity challenges which applicant states eventually led to its provisional liquidation. Thus on 29 August 2014, the first respondent looked to the applicant bank for payment of its return on its investment. The payment was not made on the due date.

The first respondent averred that around the 29th October 2014, it received a letter from the applicant's legal practitioners offering a '*repayment plan'* in which the applicant offered to

honour its payment once applicant had secured money from the sale of one of its immoveable properties in Mutare. In the meanwhile applicant suggested that the first respondent take security for its debt by mortgaging two immoveable properties owned the applicant bank in Avondale, Harare, until such time that funds were available to pay the 1st respondent its returns which the applicant indicated would be achieved by selling applicant's property in Mutare. As further security, the applicant bank also involved a third party known as Molgam Enterprises (Private) Limited.to enter into a surety agreement with the first respondent by which Molgam Enterprises allowed a *caveat* to be registered on its Greystone Park property to the extent necessary to cover the remainder of the applicant's indebtedness to the first respondent. The applicant described their tender of the properties as security as being *"an interim measure whilst the bank is looking at disposing one of its immoveable properties in Mutare thereby unlocking liquidity to expunge the Zimsec debt"*. In the meantime because actual payment was not forthcoming from the applicant, the first respondent proceeded to sue the applicant bank for the recovery of the amount which it was owed by the applicant bank. The applicant bank did not meaningfully defend the suit which then led to the High Court granting judgment in favour of the first respondent for the recovery of the first respondent's return on investment owed to it by the applicant bank. Thus on 5 November 2014, MTSHIYA J granted a default judgment in the first respondent's favour in the following terms:-

"**IT IS ORDERED THAT**

1. The defendant (applicant) pays to the plaintiff (respondent) the sum of US$1,666,388-89 [*in words*].
2. Interest thereon at the rate of 13% *per annum* calculated from the 29th August 2014 to the date of full payment, both dates inclusive.
3. Costs of suit"

The judgment seems to have motivated the applicant into making an offer of security on 29 November 2014 to the first respondent, which offer was duly accepted by the first respondent because after he judgment was obtained, the parties entered into a mortgage bond arrangement which as is described in paragraph 13 of the founding affidavit as follows:

"Para 13, founding affidavit

13. In order to avoid execution and enforcement of the order the parties entered into an arrangement in terms of which:

    13.1 Afrasia Bank Zimbabwe Limited offered two immoveable properties to the 1st respondent as security and a mortgage bond was registered against the two

properties in favour of the 1st respondent on the 20th November 2014. A copy of the mortgage bond is attached hereto as Annexure 'D'

13.2 A third party to Afrasia Bank Limited, Molgam Enterprises (Private) Limited, agreed to bind itself as surety and co-principal debtor for the due discharge of the debt that was owed to the 1st Respondent up to an amount of US$300,000-00. The third party offered an immoveable property as security and a surety mortgage bond was registered in favour of the 1st respondent. A copy of the bond is attached hereto marked Annexure 'E'.

The applicant is now desirous of an order cancelling the registration of the mortgage bonds which were registered on the applicant bank's immoveable properties mentioned in paragraph 13.1 above, on the basis that they are impeachable transactions in terms of section 42 (2) of the Insolvency Act [*Chapter 6:04*].

The applicant now states that the dispositions were made with the intention of preferring the first respondent over other creditors. The applicant bank alleges that the bank was in a liquidity crisis at the time that it registered the bonds and that as a result of its problematic financial status, it was placed under liquidation. The applicant submitted that the dispositions qualify to be impeached because they were made within the time frame mentioned in section 42; that being borne out by the fact of applicant surrendering its banking licence within six months preceding its liquidation. As a result applicant submits that the transactions ought to be disgorged in accordance with s 42 of the Insolvency Act [*Chapter 6:04*], which reads:

"42 Voidable preferences

(1) In this section—

(a) "creditor" includes a surety for the debtor and a person in a position by law analogous to that of a surety;

(b) every disposition of property made under a power of attorney, whether revocable or irrevocable, shall be deemed to be made at the time at which the transfer or delivery or mortgage of such property takes place.

(2) Subject to this section, every disposition of his property made by a debtor within the period of six months immediately preceding—

(a) the sequestration of his estate; or

(b) if he is dead and his estate is insolvent, his death;

which has the effect of preferring one of his creditors above another may be set aside by a court if, immediately after the making of the disposition, the liabilities of the debtor exceeded the value of his assets.

> (3) A disposition shall not be set aside in terms of subsection (2) if the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another"

The first respondent denies that it was made aware or even knew for itself about any liquidity challenges which applicant was facing at the time or any time before the dispositions were made, or at any time thereafter. The first respondent submits that the mortgage bonds were registered in the ordinary course of business and that in terms of s 42 (3) of the Act, the transactions were no intended to prefer it to other creditors. Thus the first respondent is not inclined towards consenting to the upliftment of the caveats without receiving payments due to it by the respondent.

The first respondent disagrees with the applicant's contention that the dispositions were made within the circumstances suggested by s 42 and accordingly insists on the due payment by the applicant bank of the maturity value on its investment and thereby prays for a dismissal of the present application.

In his book entitled "*Business Law in Zimbabwe*" Christie states at p 506:-

> "A voidable preference is any disposition of his property made by the insolvent less than six months before sequestration (or his death if his deceased estate is insolvent), which has the effect of preferring one creditor including a surety) above another. The trustee must prove that immediately after the disposition, the liabilities exceeded his assets, fairly valued as they would have as they would have appeared to a person at the date of the disposition, and not as affected by the subsequent insolvency: *Naik* v *Pillay's Trustee* 1923 AD 471, 479.
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> The creditor concerned will then be obliged to disgorge unless he can show that the disposition was in the ordinary course of business and that there was no intent to prefer him above other creditors. It has been held that ordinary course of business refers to the business of the insolvent. *Rixom* v *Mashonaland Building Loan and Agency Ltd* 1938 SR 207"

Mr *Moyo* has referred me to the case of *Pretorius's Trustee* v *Van Blommenstein* 1949 91) SA 267 (O) and the analysis of the law made by HOROWITZ J's on p 275 when he stated:

> "Before a defendant is called upon to reply to a trustee 's claim to set aside a disposition under s 29 (1) of Act 24 of 1936, the trustee must prove: (1) a disposition, as defined in section 2 of the Act, of his property made by the debtor (2) within 6 months of the sequestration of his estate (3) to his creditor (4) which has the effect of preferring one of his creditors above one another and (5) immediately after the making of such disposition, the debtors liabilities exceeded the value of his assets. When the trustee has established the five factors enumerated, the court may set aside the transaction unless the person , in whose favour the disposition was made, discharges the onus then placed upon him of proving (a) that the disposition was made in the ordinary course of business and (b) that it was not intended to prefer one creditor above another.

> ..If the respondent has succeeded in discharging the onus resting on him of proving that the disposition was in the ordinary course of business and that there was no intention to prefer, then the success of the appellant on the aforementioned five propositions cannot avail him"

In the present matter it is not in dispute that the dispositions were made by the applicant bank to the first respondent within the time frame of six months. However the remaining two propositions suggested by HOROWITZ J which the applicant bank would have to establish are not so clear cut from the papers as I will now explain.

The applicant is required to show first that the liabilities exceeded the assets 'fairly valued'. Thus the applicant needs to first establish the value or figures upon which it pleads its insolvency, and within the meaning of a fair value. In this context fairly means '*equitably*', '*objectively'*, '*honestly*'. In addition, the applicant would have to show that its liabilities exceeded its assets immediately after the dispositions were made. Immediately is '*instantly*', '*at once'*, '*directly*', '*forthwith*' or '*now*'. Once when those pre-requisites are seen to exist then the relevant portion of the Act comes into play. It would then be up to the creditor who wishes to resist an impeachment of the transaction to show that (a) the disposition was made in the ordinary course of business and (b) there was an absence to prefer 1st respondent as a creditor (refer: *Liquidator of M & C Holdings (Pvt) Ltd* v *Guard Alert (Pvt) Ltd* 1993 (2) ZLR 299 (H).

The applicant annexed various documents as proof of its alleged dire financial position after the dispositions were made. The applicant annexed the final liquidation order together with the Minutes of a Special meeting of the Board for Afrasia Zimbabwe Holdings Limited (AZHL) and Afrasia Bank Zimbabwe Limited (ABZL) held on 24 February 2015 in which the motion to surrender the banking license was carried. The applicant also annexed an RTGS payment slip (undated) which reflects outstanding RTGS payments as having been in the amount of US$15,126,370-00 to support its contention that it was facing liquidity challenges which then led to its insolvency. This evidence was furnished by the applicant for the court to rely on in arriving at such a conclusion in this matter.

The documents are unhelpful in shewing what the applicant's financial status was immediately after the disposition was made. The RTGS slip is vague and unreliable. It bears no information as to how it is relevant in the matter. It is unsigned and unverified and undated thus bearing no evidence as to whether or not it relates to payments before, after or at the time of filing; neither does it illuminate the value of the assets and liabilities of the bank. I do not understand its relevance to the matter.

Similarly, the notice of appointment of the liquidator is just that. It speaks to nothing of value in the matter.

The minutes of the meeting of the bank and the holding company dated 23rd February 2015 shed light on the reason for the bank's licence to have been surrendered. From those minutes it becomes clear that it was only after the decision was made for Afrasia Zimbabwe Holding Company to withdraw its investment as the major shareholder, that the bank's liquidity became compromised. That decision was made on 23 February 2015, so it stands to reason that the applicant bank's insolvency occurred on or immediately after the 23rd February 2015, and not immediately after the dispositions were made in November 2014. Perhaps this explains why the liquidator loosely pleaded liquidity challenges, because when one examines the applicant's founding affidavit, the liquidator stated vaguely that *"sometime in 2014, the latter suffered liquidity challenges and failed to pay its depositors/customers"* [paragraph 11, founding affidavit]. I am thus unable to come to a determination as to the date when the liquidity crisis occurred insofar as that date relates to s 42 of the Act.

The basis for calling upon the first respondent to reply to the applicant bank's claim for impeachment has not been established. That basis necessarily assumes its place on the first respondent's shoulders after applicant has laid the legal foundation for a disgorgement of the transaction in terms of s 42 of the Act.

Even if the fist respondent was required to prove the intention to prefer, the applicant's founding affidavit contains clear statements of the intention behind the applicant bank's actions in registering the bonds in favour of the first respondent. The applicant bank informed the first respondent that the dispositions were a stop-gap measure from its property portfolio when it stated in a letter to its lawyers dated 29th October 2014 that:

> "The proposed security particularised is being given as an interim measure whilst the bank is looking at disposing one of its immoveable properties in Mutare thereby unlocking liquidity to expunge the Zimsec debt. A buyer has been secured and an amount of $2.3 million is expected from this sale. The anticipated date for receiving proceeds of the sale is 31 January 2015"

The essence of the letter was to inform the first respondent that it would receive its return on its investment at a later date. In fact in the very last line of the letter, the applicant bank asked its lawyers to take care of the repayment when it stated *"may you proceed to engage Zimsec lawyers in light of the above*". The intention of the insolvent needs to be ascertained at the date of the disposition because *"A person intends the natural consequences of his acts" Myburgh, Krone En Kie, Bpkt (in Liquidation)* v *Standard Bank* S.A. Ltd 1924 CPD 146.

Further, it would appear that the applicant went to some length to assure its own lawyers and the first respondent that it was able to meet its obligations toward the first respondent. There was never any hint given upon which the first respondent could even begin to suspect that applicant was in poor financial straits, if at all that was the case.

My observation is that the respondent was not made privy by applicant bank to any perceived illiquidity arising, thus it necessarily follows that there was no intention to prefer which can be proven.

In any event registering mortgage bonds and surety deeds is a normal practice of any prudent bank. There are many transactions taking place in the banks on a daily basis and it is within the ordinary flow of business that a bank would ensure that it could guarantee a return on any investments. Such a letter offering interim measures to be taken would not have sounded any alarm bells to the first respondent.

See WILLE & MILLIN's discourse in their book "*Mercantile Law of South Africa*" 17th Edition at p 630:

> "For a disposition to be made in the ordinary course of business, it must be made in accordance with ordinary business practice and ordinary business principles; it must take place in a manner and time which would not appear to the ordinary business man unbusiness like or anomalous, and regard must be had to the ordinary practice and principles of business which are adopted among solvent men of business; where the transaction is one which is entered into in a special field of business the customs which apply in that field of business are to be taken into account"

Further, the decision to surrender the banking licence was necessitated by in-house restructuring company issues and not from liquidity issues arising from bad debts.

I also observed that the applicant has not furnished the details of any competing creditors. The word *"prefer'* in the context of s 42 would obviously involve the applicant bank having exercises freedom of choice. That meaning is lost where there are no other creditors mentioned or involved in the process of selection as is the case in this matter.

Thus it is my finding that the applicant has not made out a case for the order which he seeks. Accordingly I order as follows

"*Application is dismissed with costs*".

Wintertons, applicant's legal practitioners
Scanlen and Holderness, 1st respondent's legal practitioners